BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

VALERIE MCDANIEL, Claimant, v. SMITH'S FOOD AND DRUG, Employer, and AMERICAN CASUALTY COMPANY, Surety, Defendants.	)	**IC 2001-005876** **2001-021667** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: July 27, 2007

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Idaho Falls, Idaho, on October 25, 2006. Dennis R. Petersen of Idaho Falls represented Claimant. Alan K. Hull of Boise represented Defendants. The parties submitted oral and documentary evidence. The record remained open for the taking of three post-hearing depositions. The parties filed post-hearing briefs, and the matter came under advisement on April 10, 2007, and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accidents;

2. Whether Claimant's condition is due in whole or in part to pre-existing or subsequent injuries/conditions;

3. Whether and to what extent Claimant is entitled to:

a. Medical care;

b. Permanent partial impairment (PPI);

c. Disability in excess of impairment; and

4. Whether the Commission should retain jurisdiction beyond the statute of limitations.

CONTENTIONS OF THE PARTIES

Claimant asserts that since she is still symptomatic from her accepted industrial injuries of February 12 and October 23, 2001, she is entitled to continuing medical care, including compensation for the medical care related to the accidents paid by Claimant and her health insurer. Claimant contends that as a result of her industrial injuries, she has sustained whole-person permanent partial impairment of 5%, and permanent disability in excess of her impairment of 15%.

Defendants argue that Claimant was at maximum medical improvement (MMI) from her industrial injuries on or about April 10, 2002, and that Defendants have paid all medical bills up to and including that date. All of Claimant's medical care since that date, including a number of visits to David P. Bowman, D.O., Livingston Chiropractic, Burke Family Chiropractic Integrative Health, Catherine Linderman, M.D., and Eric Walker, M.D., were not reasonably necessary and are not compensable. Defendants contend that Claimant has not sustained any PPI as a result of the industrial accidents at issue, but if the Commission were to disagree, Claimant's

whole person impairment is 2% at the most. Defendants assert that Claimant sustained no disability in excess of impairment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant offered at hearing;

2. Claimant's Exhibits 1 through 33, admitted at hearing;

3. Defendants' Exhibits 1 through 19, admitted at hearing; and

4. Post-hearing depositions of Eric Walker, M.D., David Bowman, D.O., and Douglas N. Crum, C.D.M.S.

During the deposition of Dr. Walker, counsel for Claimant inquired whether Claimant was entitled to an impairment rating. Defendants objected and interposed a continuing objection to the line of questions, asserting that the questions called for an opinion formed post-hearing in contravention of Rule 10(E)(4), J.R.P. As evidenced by Claimant's Supplemental Answers to Interrogatories and Request for Production of Documents, dated October 13, 2006, Defendants were advised prior to the hearing regarding Dr. Walker's proposed testimony relating to impairment. Defendants' objection, first interposed at page 26 of Dr. Walker's deposition, is overruled, as are all other objections made during the post-hearing depositions.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 48 years of age, and resided in Idaho Falls, Idaho, with her husband. Claimant graduated from Idaho Falls High School in 1977. She has no

other formal education or training, but has acquired substantial skills through her work experiences.

2. Claimant went to work for Employer in April 1992 as a clerk in the meat department. Approximately six months later, she transferred to the bakery and continued to work as a clerk until she was promoted to bakery manager in 1995 or 1996.

3. Claimant's duties as bakery manager include baking frozen product, packaging, filling display cases and tables, inventory, ordering, freight, and breaking out the frozen product for the next-day's baking. Claimant's work entails a great deal of upper-extremity reaching, pushing, and pulling. Claimant is required to lift up to 40 pounds on an occasional basis, primarily on the days when freight comes in.

FEBRUARY 2001 INJURY AND RELATED MEDICAL CARE

4. On February 12, 2001,[1] Claimant was stowing the day's freight when she picked up a box, turned to place it on the shelf, and felt a "pop" or "crack" in her low back. Tr., p. 30. Claimant reported the incident, and sought medical care from Kelly Harris, D.C. Dr. Harris diagnosed acute moderate lumbar sprain/strain and acute mild to moderate right leg sciatica. He recommended physical therapy and manipulation, imposed a 25-pound lifting restriction, and limited repetitive lifting to not more than 15 pounds. Claimant missed no work as a result of the accident. Claimant continued to treat with Dr. Harris three times per week through April 2001.[2] On April 24, Dr. Harris referred Claimant to Steven Marano, M.D., a neurosurgeon. Claimant saw Dr. Marano the same day.

[1] Initially, there was some confusion about the date of the accident, but by the time of the hearing it was clear that this accident occurred on February 12.

[2] Claimant returned to Dr. Harris on December 20, 2002 and received approximately eight treatments through July 1, 2003. Nothing in the record ties these subsequent visits to Claimant's industrial injuries and they are presumed to be unrelated.

5. Dr. Marano ordered an MRI of Claimant's lumbar spine along with flexion/extension films to rule out herniation, stenosis, or instability. X-rays were negative for abnormal motion, and the MRI showed degenerative hypertrophic changes of the inferior facets and ligamentum flavum at L3-4 and L4-5 along with some shallow disc bulging at several levels. There was no central canal stenosis or lateralizing disc herniation. The results of the imaging were conveyed to Claimant by telephone and she was advised that she was not a surgical candidate. Dr. Marano referred Claimant to David Simon, M.D., a physical medicine and rehabilitation specialist.

6. Claimant saw Dr. Simon on June 6. After taking a patient history and performing an exam, Dr. Simon diagnosed low back pain most likely due to a strain injury. He prescribed a short course of steroids to address any inflammatory response and noted that he would consider a referral to physical therapy depending upon Claimant's reaction to the steroids. Claimant returned on June 14, reporting that the steroids were not helpful. Dr. Simon referred Claimant to physical therapy.

7. Claimant saw Brenda Fitz, MPT, on June 27. Claimant attended six sessions of physical therapy between June 29 and July 18, canceling two appointments due to illness.

8. On July 12, Claimant returned to Dr. Simon, reporting that the physical therapy had not helped her pain. On exam, Dr. Simon detected tenderness over Claimant's right sacroiliac (SI) joint, and gave her an injection there that relieved her pain. When Claimant returned to Dr. Simon on July 19, she reported that the injection had helped. He advised her to continue her physical therapy exercises at home and to follow up in two weeks. Claimant returned on August 2, and reported to Dr. Simon that her low back pain was back and at the same

level it had been prior to the injection. Dr. Simon noted that he was suspicious that Claimant's problem was actually with her SI joint, and recommended a fluoroscopy-guided SI injection.

9. Surety authorized the fluoroscopy-guided injection and Fritz Schmutz, M.D., performed the procedure on August 10. Claimant returned to Dr. Simon's office on August 16, and reported that the injection only helped for a couple of days. Dr. Simon opined that the fact that Claimant got relief for two days was indicative that the problem was with the SI joint, not her low back, but also observed that he was out of treatment options.

10. Claimant didn't return to Dr. Simon until October 1, 2001. She reported that she had been doing quite well until she mowed the lawn and her back pain returned. On exam, Dr. Simon noted some tenderness in Claimant's paraspinal muscles, but no trigger points. He prescribed a short course of steroids to help with any inflammation, and opined that Claimant had exacerbated her previous symptoms.

OCTOBER 2001 INJURY AND RELATED MEDICAL CARE

11. On October 23, 2001, Claimant was moving a cart loaded with frozen product when she slipped in some water and fell to the floor, landing on her left buttock and hand. Claimant reported the accident immediately and sought medical care at Idaho Urgent Care, where she was seen by Dr. Bowman. X-rays of Claimant's cervical and thoracic spine showed degenerative disease but no apparent fracture. Thoracic images were incomplete, and the radiologist recommended additional views of the thoracic spine, along with a "swimmer's view" of Claimant's cervical spine.

12. Dr. Bowman's chart notes are virtually undecipherable. As was evident during his deposition, even he couldn't read them reliably. Dr. Bowman's findings on exam and the basis of his treatment recommendations are non-existent outside of his deposition testimony. In

that deposition, Dr. Bowman testified that on Claimant's first visit he found her left wrist was tender, and observed spasm and loss of range of motion in all three levels of her spine. Dr. Bowman diagnosed cervical, thoracic, and lumbar strain and a wrist sprain. He treated her with moist heat and ultrasound, and discussed future treatment with prolotherapy[3] and trigger point injections.

13. Claimant had the additional recommended x-rays on October 26, along with an x-ray of her left wrist. On November 1, she saw Dr. Bowman to review the x-rays, all of which were normal. Claimant underwent a second treatment of moist heat and ultrasound for her thoracic spine. Although Dr. Bowman treated Claimant's thoracic spine on November 1, his diagnosis was sacroiliitis, an inflammation of the SI joint. He noted that he wanted to start the prolotherapy soon.

14. Claimant returned to Dr. Bowman on November 5 for the first of what was to be a long course of injections. Dr. Bowman's chart notes use the terms "prolotherapy" and "trigger point injections" interchangeably, although medically they are nothing alike. The bulk of the injections were prolotherapy, though Claimant did receive a few steroidal injections that were unrelated to this claim.

15. On November 6, Claimant returned to Dr. Simon. She advised him that she had re-injured her back at work and was being treated by Dr. Bowman. Dr. Simon relinquished Claimant's care to Dr. Bowman.

16. Claimant continued to "treat" with Dr. Bowman weekly throughout the fall of 2001 and the winter and spring of 2002, receiving numerous prolotherapy injections along with treatment for a number of maladies and complaints unrelated to her industrial claim.

[3] Prolotherapy is a regimen of injections that purports to strengthen ligaments by irritating the surrounding tissue.

Dr. Bowman's billings are as murky as his medical records, making it difficult to sort out what services were actually provided and billed.

DR. RHEIM B. JONES IME

17. In April 2002, Surety sent Claimant to Rheim B. Jones, M.D., for an independent medical evaluation (IME). Dr. Jones saw Claimant on April 10. His findings were compiled in a forty-nine-page report dated the same day. Dr. Jones reviewed Claimant's medical records and took a history from her. He described her as "a good historian." Defendants' Ex. 8, p. 6. Dr. Jones dictated the history and record review in Claimant's presence.

18. Dr. Jones conducted a thorough examination of Claimant's back and lower extremities, evaluating posture, tenderness, range-of-motion, strength, reflexes, sensation, and vascularization. In addition, he performed twenty-one separate tests for various lumbar pathologies including radiculopathy, discogenic pain, mechanical pain, instability, facet syndrome, degenerative disc disease, ankylosing spondylitis and non-organic pain. Dr. Jones found no abnormal objective findings in Claimant's back and lower extremities, and all tests for lumbar pathology were negative. Dr. Jones examined Claimant's neck and upper extremities with similar rigor, finding no abnormalities, and performed eight different tests for cervical pathology, all of which were negative.

19. Dr. Jones opined that:

- Claimant sustained a mild lumbosacral sprain as a result of her February 2001 work accident;
- Claimant's condition has not changed despite 14 months of treatment;
- Claimant was at MMI with regard to her lumbar sprain;
- Claimant sustained a mild cervical strain as a result of her October 2001 work accident. All complaints arising from that event have resolved with the exception of the lumbar pain, which has persisted, unchanged, since her original injury.

20. Dr. Jones determined that Claimant sustained no impairment as a result of the work accidents:

> [Claimant] has no significant clinical findings, no observed muscle guarding or spasm, no documented neurological impairment, no documented alteration of structural integrity, and no other indication of impairment related to the injury of 02/12/01 or the injury of 10/23/01.

Id., at p. 39. Claimant's lack of medical findings placed her in DRE Lumbar Category I, Table 15-3, of the AMA's *Guides to the Evaluation of Permanent Impairment,* 5th Ed. (AMA Guides). Dr. Jones opined that Claimant was able to return to work without restrictions, that the care she received had been appropriate, and that she was not in need of any additional care.

21. Defendants terminated Claimant's benefits based on Dr. Jones' report.

CONTINUING MEDICAL CARE

22. Claimant disagreed with Dr. Jones' report, going so far as to call him a liar (*See*, Defendants' Ex. 3, p. 18) and continued to see Dr. Bowman every seven to ten days for injections for another year. Claimant reported that Dr. Bowman's injections did nothing to improve her low back. The only reason she could give for continuing the treatment for eighteen months was that "[Dr. Bowman] told me that they had helped everybody that he had given them to and that they would help me." Tr., p. 37.

23. In mid-April 2003, Claimant self-referred to Livingston Chiropractic, where she received treatment three times per week until the middle of June. There are no chart notes indicating what treatment Claimant received, but she testified that it involved stretching exercises.

24. Claimant self-referred to Burke Family Chiropractic Integrative Health Services, Inc., on October 10, 2003, reporting pain in her left low back dating from her February 2001

industrial injury. She was diagnosed with cervical sprain/strain, lumbar pain, sciatic neuralgia and sacroiliac sprain/strain. Claimant received treatment approximately twice per week from October 10 through November 18. During that period, Claimant received treatments for her low back and SI joint, along with treatments directed at headache, her shoulders, the area between her shoulders and her mid-back.

25. On October 14, Claimant self-referred to Catherine Linderman, M.D., at Creekside Pain Clinic. She reported pain in her neck, shoulders, and low back dating to her February 2001 accident. Claimant apportioned 25% of her pain to her cervical and thoracic regions and 75% to her low back. Dr. Linderman reviewed both MRI and x-ray imaging and examined Claimant, finding no objective evidence of lumbar or cervical pathology. Dr. Linderman explained to Claimant that pain can be mechanical, neuropathic, or muscular in origin, each of which is treated differently. Dr. Linderman proposed two lumbar epidural steroidal injections (ESI) one week apart in an effort to pinpoint the type of pain Claimant was experiencing.

26. On December 15, Claimant had the first lumbar ESI, and the second was administered on December 22. Based on the results, Dr. Linderman ordered radiofrequency neurolysis of the medial branch nerves in Claimant's lumbar spine. The procedure was done on January 29, 2004.

27. Claimant returned to Dr. Linderman on March 18, 2004. She reported that the radiofrequency neurolysis had not been of much benefit. Dr. Linderman recommended a trial of methadone. This was Claimant's last documented visit with Dr. Linderman.

28. Claimant did not seek additional treatment for her work injuries for a year. In late March 2005, Claimant saw Dr. Eric Walker. Dr. Walker had previously treated Claimant for

injuries received in an automobile accident in the late 1990s. Dr. Walker reviewed Claimant's previous imaging studies and conducted an exam. He could not find any objective pathology for Claimant's pain. Dr. Walker tended to believe that Claimant's pain was related to her facet degeneration. In light of Claimant's long period of treatment without improvement, Dr. Walker recommended a return "to the beginning" with a regular conditioning program and appropriate back exercises. He noted that she had previously been instructed in these modalities and referred her to physical therapy.

29. Claimant returned to Dr. Walker on May 12. She reported that she had been receiving physical therapy for about a month and was finding it beneficial. After exam, Dr. Walker became even more convinced that Claimant's pain was facet-mediated and not related to her SI joint. Dr. Walker renewed Claimant's prescription for physical therapy. Claimant returned for four more physical therapy sessions over the next month, and was discharged from therapy on June 21.

30. Claimant returned to Dr. Walker for follow up on September 29. She reported that her back was about the same, and her pain varied depending upon her work. Claimant was also complaining about pain in her right shoulder and elbow, which she thought might be related to her October 2001 injury, explaining to Dr. Walker that she struck her right elbow when she fell.[4] Dr. Walker had no real recommendations, noting that Claimant was not a surgical candidate, that she was regularly using anti-inflammatories, and ice massage on occasion. She had had physical therapy, injections, and had a radiofrequency neurolysis, all without noticeable improvement. Dr. Walker observed that while Claimant had been given some temporary restrictions by Dr. Bowman, no permanent restrictions had been recommended. He limited

[4] At hearing, Claimant described falling on her *left* buttock and wrist in the October 2001 accident, and made no mention of right-sided upper extremity injuries.

Claimant to no lifting greater that 35 pounds frequently or more than 50 pounds occasionally and no prolonged or repetitive bending, twisting or stooping. Dr. Walker's restrictions place Claimant in the "medium" work capacity category.

31. Claimant's last documented visit with Dr. Walker was October 27, 2005. She reported that her low back was about the same, and her right elbow and shoulder were improved. Dr. Walker discussed the possibility of another course of lumbar injections, but nothing was ordered and this course was not pursued.

ADDITIONAL EVALUATIONS

FCE

32. Claimant underwent a functional capacity evaluation (FCE) with Bryan D. Huntsman, M.S., P.T., on October 5, 2006. Mr. Huntsman believed that Claimant performed with maximum effort and that the results of the evaluation were valid. Mr. Huntsman observed a "pronounced" antalgic gait presenting on the left lower extremity,[5] slightly reduced trunk range of motion, and normal reflexes, bilaterally. Claimant had reduced strength in the left hip flexor and hip; all other testing of the lower extremities was equal and symmetrical, bilaterally.

33. Based on the results of the FCE, Mr. Huntsman placed Claimant in the "light-medium" to "medium" work capacity category, generally permitting lifting of 40 pounds occasionally, 20 to 25 pounds frequently and 15 to 16 pounds constantly.

Vocational Evaluation

34. Defendants retained Douglas Crum, C.D.M.S., to prepare an evaluation of Claimant's permanent partial disability. As preparation for his report, Mr. Crum reviewed medical records, Claimant's deposition, and tax returns. He interviewed Claimant, and visited

[5] Neither Dr. Jones nor Dr. Walker observed any gait disturbances when they examined Claimant.

her job site and reviewed the physical requirements of her position.

35. Mr. Crum's report is dated October 12, 2006. Mr. Crum opined that Claimant's time-of-injury position was within the work restrictions imposed by Dr. Walker, as well as within the slightly more restrictive conditions recommended by Mr. Huntsman in the FCE. He also noted that Claimant has continued to work at her time-of-injury job, missed no work as a result of either of the industrial injuries that are the subject of this proceeding, and is earning a wage in excess of her time-of-injury wage. Based on these factors, Mr. Crum concluded that as of the time of his report, Claimant had not suffered any loss of earning capacity as a result of her industrial injuries. In the event that she were to be required to find other work, Mr. Crum estimated that Claimant would have a temporary loss of earning capacity of not more than 15%, but emphasized that such a loss of earning capacity was theoretical. Mr. Crum opined that given restrictions regarding bending, twisting, and stooping, her access to the labor market might be decreased if she were forced to seek work other than with her current employer. Mr. Crum estimated this loss to be approximately 15%.

36. Mr. Crum stated in his report that he was not aware than any physician had given Claimant an impairment rating. Nevertheless, Mr. Crum opined that Claimant had sustained permanent partial disability of approximately 10%, inclusive of any PPI, based on the *theoretical* loss of wage-earning capacity and loss of market access.

37. Defendants deposed Mr. Crum on December 19, 2006. Mr. Crum testified that if he relied on Dr. Jones' zero impairment and no restrictions, Claimant would have no disability in excess of her impairment. Similarly, relying on Dr. Walker's 2% impairment related to the accident and her medium work capacity, and assuming she remains employed by Employer, her disability would be minimal, if any. Using Dr. Walker's impairment, and a need to compete in

the job market, Claimant's disability would be 10%, inclusive of impairment.

DISCUSSION AND FURTHER FINDINGS

CAUSATION/MEDICAL CARE

38. It is undisputed that Claimant strained her back, primarily her low back, in industrial accidents on February 12, and October 23, 2001. Though originally framed as an issue of causation, a threshold issue in this proceeding is whether Defendants were obligated to continue providing medical treatment once Claimant had been determined to be medically stationary.

> The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994). Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432(1) obligates the employer to provide treatment, if the employee's physician requires the treatment and if the treatment is reasonable.

39. Defendants accepted Claimant's February 2001 injury claim, and paid for her treatment with Drs. Harris, Marano, and Simon, including diagnostic imaging, prescriptions, physical therapy, and lumbar ESI treatment. Defendants accepted Claimant's October 2001 claim and paid for nearly six months of treatment from Dr. Bowman, including diagnostic imaging, prescriptions, and months of prolotherapy. It was not until Defendants received the

IME report from Dr. Jones, in April 2002, that it ceased paying medical benefits in reliance on Dr. Jones' opinion that Claimant had reached medical stability.

40. There is no credible medical evidence disputing Dr. Jones' opinion that Claimant was medically stationary in April 2002. Thereafter, the question becomes less a question of causation and more a question of what treatment is required and reasonable. "It is for the physician, not the Commission, to decide whether the treatment is *required*. The only review the Commission is entitled to make of the physician's decision is whether the treatment was *reasonable*." *Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720, 722, 779 P.2d 395, 397 (1989) (emphasis added).

Medical care is reasonable when:

> (1) the claimant made gradual improvement from the treatment received; (2) the treatment was required by the claimant's physician; and (3) the treatment received was within the physician's standard of practice and the charges for the treatment were fair, reasonable, and similar to charges in the same profession.

Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 585, 38 P.3d 617, 623 (2001) (citations omitted).

41. The Referee finds that the treatment Claimant received subsequent to Dr. Jones' finding of medical stability was not reasonable, and is not compensable. Claimant's treatment fails the first prong of the reasonableness test. Her low back condition did not improve as a result of *any* of the treatment she received *subsequent* to Dr. Jones' IME. In fact, there is little evidence in the record to suggest that she improved as a result of any of the treatment she received *prior* to Dr. Jones' IME. Claimant tried physical therapy, chiropractic treatment, lumbar ESI, prolotherapy, medications, and radiofrequency neurolysis. None of these treatments led to an improvement of Claimant's condition. The only therapy that Claimant consistently reported to be at all helpful was the exercise programs that were part of her physical therapy, yet

Claimant was non-compliant with her home exercise regimes. Dr. Jones summed up the situation when he noted that "[t]he work/accident related injuries are now resolved. Persistent symptoms are expected." Defendants' Ex. 8, p. 38.

Additionally, and with particular regard to the treatment by Dr. Bowman, the Referee cites to previous decisions of this Commission that determined that prolotherapy treatments are not "reasonable." *See, Brisson v. Terry B. Hale, DDS, and State Insurance Fund*, 2000 IIC 0736 (00 IWCD none) ("[p]rolotherapy is not generally recognized in the medical community as a efficacious treatment. . . . Such treatment was not reasonable under the circumstances.") Even if prolotherapy was a well-accepted treatment, one has to question the reasonableness of continuing such "treatment" for nearly two years when the patient reports no improvement from the "therapy."

PPI

42. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

43. Dr. Jones' opined in his IME that Claimant's PPI was zero. None of Dr. Walker's

records include an impairment rating, but he was asked about it during his deposition. Eventually, Dr. Walker testified that if he had to give Claimant an impairment rating, he would place her in DRE Category I or II, "somewhere between 0 and 5 percent would be probably the range of impairment for her." Dr. Walker Depo., p. 27. Dr. Walker continued:

> Q. [By Petersen] And would you relate that impairment to the industrial accidents of February 2001 and October of 2001 if her history is prior to those accidents she did not have any low-back [sic] pain?
>
> * * *
>
> THE WITNESS: That's obviously the most difficult part, particularly in this case. I think her impairment primarily would be based upon degenerative changes with her imaging, and most of those degenerative changes actually did appear to be preexisting. And, again, in and of itself I don't think I would do an impairment rating just based on imaging. You would still have to have some symptoms referable to this.
>
> My own style with this would be if I gave her a 5 percent impairment, I would probably apportion it and say the vast majority of the degenerative changes would be attributed to a preexisting condition. I would probably place like 3 percent preexisting and 2 percent related to the industrial injury, something in that order.

Id., pp. 27-28. Dr. Walker also testified that the reason for imposing restrictions related both to preventing or slowing Claimant's degenerative condition as well as preventing an exacerbation of her pain.

44. Dr. Walker's extemporaneous impairment rating, of which even he sounds unsure, is not as persuasive as the well-reasoned and well-explicated rating given by Dr. Jones. While Dr. Walker certainly is qualified to give impairment ratings and frequently does so, he did not initially give Claimant an impairment rating, although he knew that Claimant related her complaints to an industrial injury. When specifically asked what rating he would give, he identified two DRE categories that might be applicable, with a corresponding impairment "probably" in the 0 to 5% range. He then went on to note that it was difficult to determine what, if any, of the impairment was related to the accident since the rating was based on Claimant's

pre-existing (although asymptomatic) degenerative condition. Finally, Dr. Walker noted that the restrictions he imposed were as much to prevent or slow Claimant's pre-existing condition as they were related to her pain complaints. Ultimately, Dr. Walker did not dispute or otherwise take issue with Dr. Jones' rating of zero impairment.

REMAINING ISSUES

45. Given the Commission's decision regarding the issues of medical care and impairment, all other issues are moot. Without impairment there can be no disability, apportionment no longer remains an issue, and there is no need for the Commission to retain jurisdiction.

CONCLUSIONS OF LAW

1. Claimant was injured in the course of her employment on February 12 and October 23, 2001. Claimant received appropriate medical care for her injuries until she reached medical stability. Medical treatment Claimant received subsequent to reaching MMI was not reasonable and is not compensable.

2. Claimant sustained no permanent partial impairment as a result of her industrial injuries.

3. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 18 day of July, 2007.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of July, 2007 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

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djb /s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

VALERIE MCDANIEL, Claimant, v. SMITH'S FOOD AND DRUG, Employer, and AMERICAN CASUALTY COMPANY, Surety, Defendants.	)	**IC 2001-005876** **2001-021667** **ORDER** Filed: July 27, 2007

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant was injured in the course of her employment on February 12 and October 23, 2001. Claimant received appropriate medical care for her injuries until she reached medical stability. Medical treatment Claimant received subsequent to reaching MMI was not reasonable and is not compensable.

2. Claimant sustained no permanent partial impairment as a result of her industrial injuries.

3. All other issues are moot.

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 27 day of July, 2007.

INDUSTRIAL COMMISSION

/s/_____
James F. Kile, Chairman

/s/_____
R.D. Maynard, Commissioner

/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of July, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

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djb /s/_____